IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10429 of 2000

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MALHOTRA STEEL CO.

Versus

DEPUTY COMMISSIONER OF INCOME TAX

Appearance:

MR SN SOPARKAR for Petitioner

MR Mihir Joshi with Mr MANISH R BHATT for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE M.S.SHAH

Date of decision: 26/12/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

1. In respect of assessment year 1989-90. huge additions were made to the petitioner's returned income and the petitioner was assessed at Rs. 61,33,470/-. The petitioner carried the matter in appeal before the Commissioner (appeals) and thereafter before the Income tax Appellate Tribunal. The Tribunal set aside the assessment and remanded the matter to the assessing officer for examination of certain issues. The assessing officer passed the order on 6.3.2000 assessing the petitioner's total income at Rs. 4,25,115/-. In the meantime, the petitioner had paid the whole of the tax liability raised against it because of additions . For the assessment year 1989-90, the order dated 6.3.2000 came to be passed after remand. The petitioner contended that as per the said order, the petitioner is entitled to refund of Rs. 40,81,557/- as per the refund order prepared by the assessing officer. The petitioner made an application dated 22.5.2000 followed by reminders in July, 2000 but the same were not paid any heed to. Therefore, the petitioner has filed this petition for a writ of mandamus to direct the respondents to refund the amount of Rs. 40,81,557/with interest thereon.

2. In response to the notice, the Deputy Commissioner of Income tax has filed an affidavit in reply contending that it was considered that the assessment order dated 6.3.2000 passed by the assessing officer was not in consonance with law and on facts and was apparently prejudicial to the interest of revenue. Therefore, on 4.10.2000, the Commissioner has initiated action under section 263 of the Income tax Act , 1961. We are informed that the aforesaid proceedings under section 263 are still pending before the Commissioner of Income tax.

3. Learned counsel for the petitioner has submitted that when the petitioner is entitled to refund of the aforesaid amount as per the assessment order dated 6.3.2000 and the same is still holding the field, the respondents cannot be permitted to withhold the refund amount on the ground that proceedings under section 263 are still pending.

4. On the other hand, Mr. Joshi for the revenue submits that when there is possibility of substantial demand being raised after fresh assessment, the department is justified in withholding the refund amount.

5. In rejoinder, Mr. Soparkar for the petitioner submits that each of the partners of the dissolved firm

is having taxable income and that one of the partners is prepared to give security including agricultural land belonging to him. Mr.Soparkar further submits that no interest of revenue would be adversely affected by releasing the amount when one of the partners of the dissolved firm is prepared to give adequate security for the amount which is ordered to be released.

6. Having heard the learned counsel for the parties, we find that while the petitioner had earlier made applications before the department for refund of Rs. 40 lacs and odd amount as per the order dated 6.3.2000, it was after filing of the present petition on 29.9.2000 and after issuance of notice by this court on 4.10.2000 that the petitioner came to be served with the show cause notice under Section 263 of the Act. Hence, the interests of justice require two fold directions to be issued .

7. We accordingly direct as under:

(A) In the first place, the assessee shall cooperate with the Commissioner for completion of hearing under section 263 of the Act by 31.1.2001 and the Commissioner shall get the order under section 263 served on the petitioner by 15.2.2001. If the order is in favour of the petitioner, obviously, the department will have to refund the tax amount in question and that shall be done by 28.2.2001.

(B) In case for any reason other than non-cooperation from the petitioner, the Commissioner does not decide the proceedings under section 263 of the Act by 15.2.2001, the respondents shall consider the petitioner's application for refund of the amount due as per the assessment year dated 6.3.2000 upon the petitioner furnishing adequate security for the amount of refund, to the satisfaction of the assessing officer. This exercise shall be completed within one month from the date on which the petitioner furnishes security.

8. Rule is made absolute to the aforesaid extent only. There shall be no order as to costs.

(D. M. Dharmadhikari, C.J.)

(M. S. Shah, J.)

parekh